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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

No opinions were issued by the courts below. The District Court without an opinion entered an Order and Judgment on August 17, 1960 (R. 28) granting respondent's motion for judgment on the pleading and dismissing the complaint. The United States Court of Appeals for the District of Columbia Circuit issued a judgment on May 11, 1962 (R. 29) affirming the judgment of the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 14, 1962 (R. 29)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Certiorari was granted by this Court on October 15, 1962 (R. 30).

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived petitioner of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, Section 8, Clause 4 of the Constitution provides

> "The Congress shall have Power . . . To establish an uniform Rule of Naturalization. . . ."

The Fifth Amendment to the Constitution provides in pertinent part

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

> "Loss of nationality by naturalized national
>
> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> "(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.
>
> "(b) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 of this title shall not be counted in computing quantum of residence.

"(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 and 354 of this title shall not be counted in computing quantum of residence."

Section 101 of the Immigration and Nationality Act of 1952, 66 Stat. 166, § 101(a)33, 8 U.S.C. § 101(a)33 reads as follows:

"The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

The text of other relevant provisions of the Immigration and Nationality Act of 1952, Sections 353, 354, 356 and also 349 are attached to this brief as an appendix.

STATEMENT OF THE CASE

Petitioner was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (R. 2, 9, 20).

Petitioner lived in the United States continuously from 1939 to 1954 -from age five to age twenty-five.

She was educated at grade school at Croton-on-Hudson, New York, in high school at Cornwall-on-Hudson, New York, and Flushing, Queens, New York, and at Smith College in Northampton, Massachusetts, where she was graduated in 1954 with the degree of Bachelor of Arts. Thereafter, she studied at the University of Berne in Switzerland from 1954 to 1955 on a scholarship given by the Institute of International Relations in New York; and in the following year was a full-time student at the Sorbonne in Paris. She returned to the United States in April 1956, took up residence in Nutley, New Jersey and was employed in New York City (R. 2, 9-10, 20).

On June 6, 1956, petitioner left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom petitioner had become engaged while studying in Paris. Since that time, petitioner lived continuously with her husband in the Federal Republic of Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957 (R. 2, 3, 10, 20-21)

The two sons born to petitioner, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (R. 3, 10, 21).

During all the time of her residence in Germany until June 1959, petitioner was in possession of a valid United States passport. In June 1959, however, the United States Consulate in Dusseldorf refused to grant petitioner an extension of her passport contending that petitioner had lost her United States citizenship. In September 1959, petitioner was requested by the Amer-

ican Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, petitioner was served with a "Certificate of Loss of Nationality of the United States" (R. 3, 10-12, 21-23).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed by letter of January 20, 1960, the previous administrative decision that petitioner had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving petitioner without further administrative remedy. Pursuant to this ruling petitioner is now being denied all rights and privileges of United States citizenship, including a United States passport (R. 12, 23).

Petitioner is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (R. 1-2, 4, 7, 8-9).

Petitioner feels herself to be an American. She feels no political connection with Germany or its Government and has no political loyalty or allegiance to that country. Although she could acquire German citizenship because of her marriage to a German citizen she has not done so. She desires both to continue to be an American citizen and to remain with her husband and children in Germany, where her husband practices his profession (R. 4, 7-9, 12).

Prior Proceedings

On February 1, 1960, petitioner filed a complaint in the District Court for the District of Columbia alleging that Section 352, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States, and seeking a declaration that petitioner is a citizen of the United States as well as certain other relief (R. 1).

On August 17, 1960, the District Court entered an Order and Judgment (R. 28) denying petitioner's motion for summary judgment and granting respondent's motion for judgment on the pleadings, and dismissing the complaint. The Order and Judgment of the District Court recited that "Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States" (R. 28).

Petitioner took a timely appeal to the United States Court of Appeals for the District of Columbia Circuit (R. 29).

On March 24, 1961, after the case had been fully briefed and oral argument held, the Court of Appeals *sua sponte* postponed its decision in this matter pending decision by this Court of *Rusk* v. *Cort*, No. 20, October Term 1961, because, as it now appears, of the similarity of the jurisdictional issue involved.[1]

---

[1] On April 25, 1962 the Court of Appeals denied a motion by petitioner asking the Court either to decide the case promptly or to certify the matter to this Court.

Petitioner, thereupon, on May 12, 1961, filed a petition for a writ of certiorari, asking this Court to review this case *prior to judgment in the Court of Appeals*. The writ was denied on June 20, 1961, No. 963, October Term, 1960.

On May 11, 1962 after this Court had upheld the right of the respondent in *Rusk* v. *Cort*, U.S. , 7 L. ed. 809, to challenge by declaratory judgment the denial of his United States citizenship while residing abroad, the Court of Appeals entered an order (R. 29) affirming the judgment of the District Court dismissing the petitioner's complaint on the merits "on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F.2d 619 (1949)." (R. 30).

On October 15, 1962 this Court granted a writ of certiorari (R. 30).

SUMMARY OF ARGUMENT

I

Section 352 arbitrarily discriminates against naturalized citizens in violation of the Fifth Amendment's guarantee of due process. The discriminatory and arbitrary denial of citizenship to one class of American violates the Fifth Amendment's prohibition of depriving any person of life, liberty or property without due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1953).

A. The discrimination here attempts to take away the right of citizenship in the United States from a person loyal to the United States, and bearing it allegience merely because she is living abroad with her husband—a fact not a ground for revocation of the citizenship of a native-born citizen.

B. The citizenship sought to be taken away was acquired in good faith and the events occasioning her marriage and residence abroad were not contemplated at the time of petitioner's naturalization.

C. The Fifth Amendment prohibits the discrimination between native-born and naturalized citizens in their freedom to reside abroad.

(1) The discrimination seeks to deprive petitioner of a fundamental personal right entitled to special protection under the constitution. *Perez* v. *Brownell*, 356 U.S. 44.

(2) The discrimination is contrary to the often reiterated equality of born and naturalized citizens under the constitution. See *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-828.

(3) The legislation in question is novel in that it takes away citizenship without regard to intent to abandon citizenship. Previous legislation dealing with residence abroad by naturalized citizens was limited to a rebuttable presumption designed only to assist in determining actual intent.

(4) The discrimination sought to be imposed is invidious in nature and based on the premise that naturalized citizens as a class are inferior to native-born. This is established not only by the statute itself but by the exemptions which state that only by reason of special activities and special circumstances are naturalized citizens entitled to the same right to retain their citizenship, while residing abroad, as born citizens are by mere virtue of their birth.

(5) The discrimination also involves an unconstitutional assertion of a congressional power to regulate the travel and residence abroad of naturalized citizens while no such regulation of the native-born is attempted. The right to travel abroad (and to stay there) is guaranteed by the Constitution and not subject to general prohibition. *Kent* v. *Dulles*, 357 U.S. 116, 125-126 (1958).

D The discrimination cannot be justified as a proper exercise of the foreign affairs power.

There is no indication in the legislative history or the Government's Memorandum that any problem relating to the foreign affairs of the United States arises from the mere residence abroad of naturalized citizens, different in any way from the residence abroad of native-born citizens. Possible difficulties suggested—e.g., that perhaps the foreign government might not, as it does here, recognize the American citizenship of the naturalized citizen, or that the citizenship of the children of naturalized citizens raised abroad might be an occasion for conflict, are not shown not to be readily resolved by less drastic legislation not applicable to all naturalized citizens residing abroad. Legislation limited in its effect is clearly available to the Congress.

There is no justification for dealing with all naturalized citizens drastically because a few may create problems by their residence abroad. The Congress may apply the drastic remedy of denaturalization only when less drastic measures are not adequate. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349. The measures adopted must be appropriate to the difficulties to be dealt with. Congress cannot arbitrarily say that in the many countries where naturalized Americans are recognized as Americans, they should be deprived of their citizenship because there may be countries where their American citizenship might not be recognized.

Nor can it be said, as the legislative history suggests, that because some naturalized citizens living abroad may have demonstrated lack of allegiance to the United States, that others who have not demonstrated such lack of allegiance and indeed have demonstrated their allegiance, should be cast out from the body

politic of the country to which their allegiance lies. The discrimination embodied in Section 352(a) (1) is arbitrary and unconstitutional under the due process clause.

II

A. Even apart from the discriminatory nature of Section 352, there is no rational nexus between mere residence abroad and any of the evils with which Congress may deal. Mere residence abroad does not provide a rational basis for loss of nationality. Under *Perez* v. *Brownell*, 356 U.S. 44, Congress, under its foreign affairs power, may attach loss of citizenship only to political acts which may reasonably be regarded as indicating a lack of allegiance to this country and allegiance to another. Plainly there is no relationship between mere residence abroad and lack of allegiance to this country. Mere residence abroad is clearly a neutral act irrelevant to the question of allegiance. Nor does mere residence abroad entail political activity in the country of residence.

B. A general restriction on residence abroad also would plainly be an unconstitutional limitation on the right to travel which includes, of course, the right to remain abroad. See *Kent* v. *Dulles*, 357 U.S. 116.

III

Furthermore, the provision of Section 352 imposing loss of citizenship on a naturalized citizen is a penalty constituting a cruel and unusual punishment within the meaning of the Eighth Amendment.

ARGUMENT

I. SECTION 352 ARBITRARILY DISCRIMINATES AGAINST NATURALIZED CITIZENS IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS

This case marks the first time that this Court is presented with a question involving the constitutionality of a statute containing a substantive discrimination between native-born and naturalized citizens of the United States.

The reason that this Court has never had any occasion to rule on any such discrimination in the past is that this is the first and only substantive discrimination between native-born and naturalized citizens Congress has ever attempted. The provision is a new one. It first became part of our law with the passage of the Nationality Act of 1940, 54 Stat. 1170.

The challenged legislation is Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, which purports *automatically* to deprive naturalized citizens of their nationality because of continuous residence in the territory of a foreign state, either the state of origin where the period is three years, or any other foreign state where the period is five years.

No comparable provision applies to native-born citizens. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship.

Sections 353 and 354 of the Act (8 U.S.C. §§ 1485 and 1486) contain a list of exemptions from this discriminatory deprivation of citizenship embodied in Section 352. The exemptions are detailed. They are applied by the Congress as a matter of grace defining whether, as a matter of policy, certain groups of nat-

uralized citizens shall be exempted from the general prohibition of long-time residence abroad applicable to the remaining body of naturalized citizens on pain of loss of citizenship. No such prohibition and no such limitation is applied to their fellow citizens who obtained their citizenship by birth.

It is petitioner's position that the discriminatory and arbitrary denial of citizenship to one class of Americans under Section 352 violates the Fifth Amendment's prohibition against depriving any person of life, liberty or property without due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1953).

The discrimination plainly limits the rights of naturalized citizens to live and work abroad in a way that is not applied to native-born citizens. It creates a second-class citizenship. The statute is an assertion by Congress of the power to control and restrict the rights of one great class of our citizens to live, work and marry where they please, while another broad class of our citizens is free from such restraints. It is an assertion of a right which, if sustained, cannot be limited by the present scope of the statute and its exemptions. It is, in substance, a claim of right on the part of the Congress to say to naturalized citizens that they have no right to travel or remain outside the borders of the United States except under terms and conditions which Congress, as a matter of grace, may allow, while no such limitation is made on their fellow citizens who owe their citizenship to birth.[2] This dis-

[2] One irony of the terms and conditions presently in force is that the plaintiff, by reason of her more than 15 years residence in the United States, was free to marry and live abroad without loss of citizenship provided it was not in Germany. See 73 Stat. 274, 8 U.S.C.A. § 1486(5), exempting 15-year residents from the

crimination cannot be squared with the Fifth Amendment of the Constitution.

A. The Discrimination as It Affects Petitioner

If petitioner were a native-born citizen, she would be perfectly free to live abroad with her husband without losing her citizenship. However, if the challenged legislation is valid, Angelika Schneider, as a naturalized citizen, after a period of three years residence abroad must choose between giving up her American citizenship or abandoning her marital obligation to stay with her husband at his foreign residence.

A native-born woman can live with her husband abroad and yet retain her American citizenship simply because she desires to retain her identity as an American. Angelika Schneider, as a naturalized citizen, under the statute, is automatically stripped of her American citizenship contrary to her intentions, her feelings and her political allegiance.

Petitioner came to the United States when she was not quite five years of age (R. 2, 9, 20). She attended grade school and high school in suburbs of New York,

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5-year limitation on residence in countries other than the country of birth but not from the 3-year limitation on residence in the country of origin. Had plaintiff married an Austrian, a Swiss, or even a resident of Communist China, she could have lived with her husband in any of these countries secure in her American citizenship for life.

We do not here quarrel with the line which Congress has chosen to draw, however absurd it may seem on its face. We use it only to emphasize that in asserting the power to draw any line based on residence abroad, Congress is asserting a general power to restrict or forbid travel or residence abroad and that its exemption or failure to exempt from the penalty of loss of citizenship is solely a matter of grace.

and obtained her college education at Smith College (R. 2, 9-10, 20). As a natural result of her education in the American schools and spending the years of her principal development in the United States, petitioner is thoroughly American, and is attached to the United States. She is familiar with our system of constitutional government and personal rights, and any other government is necessarily foreign to her. She "regards" herself "as an American, and has no political loyalty or allegiance to either Germany or any other country except the United States." (R. 9). Her affidavit in these proceedings shows why she regards herself as an American and why she desires to retain her citizenship with the only country which has her allegiance. We quote:

> "4. I feel myself an American and I value my American citizenship highly. Practically all my relatives, except my husband and children, live in the United States and are American citizens. These include two brothers, a half brother and sister. (R. 7-8).
>
> "5. I regard the United States as my country. I have had all my schooling (grade school, high school and college) in the United States except for some post-graduate work in Switzerland and France." (R. 8)
>
> * * *
>
> "8. I regard myself as an American. I have spent my entire childhood and youth in the United States and regard it as my country. From the time I was five until I came to Germany in 1956 to be married, I had been in Germany only briefly in 1954 and 1955 travelling through and have neither felt nor had any connection with that country. I have no political loyalty or allegiance

to either Germany or any other country except the United States." (R. 9)

* * * *

"6. I am advised by the Department of State that I am no longer an American citizen and am not entitled to passport and nationality privileges as an American because I am married to a German citizen and living with him and our children in Germany where he resides and works. I am told that I have lost my citizenship because the country in which I live and in which my husband lives and works happens to be the one where I was born. I am also told that if I had married a resident of any other country and gone to live with him and raise children in the country where he lived and worked, I would not lose my American citizenship. Moreover, if I had been born rather than naturalized an American citizen I would also be able to conduct a normal family life with my husband in Germany. Instead, as a result of the action of the State Department in taking away my passport and my naturalization certificate, I am faced with a choice of giving up my husband and family life with him, or of being forced to give up my country. I do not wish to accept either alternative. I wish to be an American citizen which I feel myself to be and also to remain with my husband and our children in Germany where he practices his profession." (R. 6)

* * *

"22. I understand that the statutes involved apparently require the results reached by the State Department. I cannot believe, however, that the Constitution of the United States permits me to be faced with the cruel choice of surrendering either my family or my country. I have, accordingly, directed the institution of the necessary proceedings to establish what I believe to be the true and just conclusion that I, although natural-

ized, have the same freedom as any American girl who received her citizenship by birth to marry where I please and to live with my husband and family without giving up my American citizenship." (R. 12)

There is nothing to distinguish petitioner from any other American girl who resides with her husband abroad except the fact of her birth in Germany. Under Section 352, however, this fact alone operates automatically to deprive petitioner of her American citizenship.

Because of this provision petitioner now lives in Germany as a stateless person (R. 8). After having been raised here and under our institutions, she finds herself abandoned by her country, and subject to the mercy of governments in Germany or elsewhere, wherever she may be, whom she regards as alien.

B. The Discriminatory Statute Takes Away Citizenship Validly Secured in Good Faith With the Intent to Reside Permanently in the United States

Section 352 operates to take away American citizenship acquired in good faith with the required intention to reside permanently in the United States. It is applicable independently of the good faith of the naturalization and applies to all naturalized citizens irrespective of their intentions at the time of naturalization. It does not purport to challenge and relate back to the original naturalization. Instead it proceeds on the theory that a validly naturalized citizen can be deprived of his citizenship, if he takes up foreign residence many years after naturalization and on account of circumstances completely unforeseeable at the time of naturalization. This is plainly demonstrated by the

present case. There is in this case no question of petitioner's bona fide intention to reside permanently in the United States at the time of her acquisition of citizenship, nor has the Government so suggested. Petitioner was naturalized in 1950 at the age of sixteen, having resided in the United States since 1939 (R. 9, 20). At the time she acquired her citizenship she had just graduated from high school and was beginning her freshman year at Smith college (R. 9). She could not have known or suspected that years later she would meet and marry Dr. Schneider and live with him in Germany.

Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as an attack on the original naturalization, it would clearly be arbitrary. *Cf. Bailey* v. *Alabama*, 219 U.S. 219; *Tot* v. *United States*, 319 U.S. 463 (1943); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

The entirely different problem of the alien who acquires American citizenship with no intention to make the United States his home, but only for the purpose of receiving the advantages of an American passport or American diplomatic protection is adequately covered by another provision of the Act.

Section 340(d) of the Immigration and Nationalization Act of 1952, 8 U.S.C. § 1451(d), meets this problem by establishing a rebuttable presumption that a naturalized citizen who, within five years of his naturalization, returns to his country of origin, or goes to any other foreign country, lacked the required intention to reside permanently in the United States at the time he applied for naturalization. If this presumption is not

rebutted the naturalization may be set aside as having been acquired by fraud.*

This Court in *Luria* v. *United States*, 231 U.S. 9 (1913) sustained this provision, as embodied in an earlier Act, as a proper exercise of the naturalization power. This Court warned, however, this presumption, if unreasonably applied, could deprive naturalized citizens of their constitutional rights. In *Luria* this Court stated, 231 U.S. at 27:

> "* * * But we are of the opinion as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to acquire but slight countervailing evidence to overcome it . . . So construed we think the provision is not an excess of the power of Congress."

Section 352, since it operates to deprive validly naturalized citizens of their citizenship and does not challenge or relate back to the original naturalization,

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*Section 340(d), 8 U.S.C. § 1451(d), reads in pertinent part as follows:

> "If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . . ."

cannot, as was the presumption in *Luria*, be sustained as a proper exercise of naturalization power. Nor did the Government so contend in its Memorandum on Certiorari.[4]

Article 1, Section 8, Clause 4 of the Constitution which grants Congress the power "to establish a uniform Rule of Naturalization" gives Congress the power to confer, but not the power to take away citizenships validly acquired. As this Court noted in

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[4] While the Government has not attempted to sustain Section 352 as an exercise of the naturalization power the legislative history of the 1940 Act indicates that the provisions now contained in Section 352 were erroneously sought to be justified as a proper exercise of the naturalization power designed to expatriate person who acquired United States citizenship without ever having had the required intention to reside permanently in the United States.

Thus, for example, the Cabinet Committee with recommended passage of the Act observed:

> "Admission of an alien to the privilege of American citizenship is subject to the condition that he intend to reside permanently in the United States and perform the duty of a citizen. When a naturalized citizen abandons his residence in the United States and takes upon residence in the state of which he was formerly a native definite termination of his American citizenship should follow." (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 511-512 (1940)).

Mr. Flournoy, Assistant Legal Advisor of the Department of State similarly stated:

> "I do not know why a person who obtained naturalization upon a statement [under oath that he intends to reside permanently in the United States] should retain citizenship if he goes and lives for some long period even in a third country. Of course, the cases that give us most trouble are those cases of persons who go back to their native land . . ." (*Id.* at 141).

United States v. *Wong Kim Ark*, 169 U.S. 649, 703 (1898):

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. . . . Congress [has] no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress. . . ."

Accordingly, Section 352 plainly represents a discrimination between two classes of persons rightfully citizens of the United States—those who acquired citizenship by birth and those who acquired citizenship through naturalization.

C. The Fifth Amendment Prohibits Discrimination Between Native-Born and Naturalized Citizens in Their Freedom to Reside Abroad

It is well settled that the Fifth Amendment's due process clause, like the Fourteenth Amendment's equal protection clause which applies to the States, forbids the Federal Government to deprive any person of fundamental rights on an arbitrary or discriminatory basis.

> "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law'; and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjusti-

fiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1953).[2]

[2] See also, *e.g.*, *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939); *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

The first question presented in this case is, therefore, whether the discrimination against naturalized citizens found in Section 352, is "so unjustifiable as to be violative of due process."

The burden of justifying this discrimination as reasonable is especially high here. This is because of the following factors which will be discussed at greater length below.

1. The nature of the right involved—citizenship—is one of the most precious of all personal rights.

2. The discrimination is plainly contrary to the principle of equality between native-born and naturalized citizens as expressed in the opinion of this Court throughout its history.

3. The discrimination is without any legislative precedent.

4. The discrimination is invidious in nature in that it is based on the point of view that naturalized citizens *as a class* are inferior to the native-born, thereby relegating the naturalized citizen to a second-class citizenship status.

5. The discrimination represents an unconstitutional assertion of Congressional power to regulate, in its discretion, the travel and residence abroad of naturalized citizens, while no such regulation of the native-born is attempted.

1. The Discrimination Involves a Vital Personal Right

The discrimination in the statute involves not a mere regulation of business, but affects a most fundamental individual right, the right of citizenship. This Court has often recognized that citizenship is perhaps the most precious of all individual rights. *Perez* v. *Brownell*, 356 U.S. 44 (1958); *Trop* v. *Dulles*, 356 U.S. 86 (1958); *Knauer* v. *United States*, 328 U.S. 654, 659 (1946); *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). Loss of citizenship where, as here, it results in statelessness means that the individual has no right to protection whatsoever, and that his right to live anywhere is at the mere sufferance of the state at whose borders he may happen to be.

Where discrimination involves such a vital individual right, the burden of justifying the discrimination as reasonable is substantially higher than in the case of classifications affecting interests constitutionally less important, such as laws dealing with the regulation of business matters. See *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638-639.

2. The Discrimination Is Contrary to Established Legal Principles

The discrimination in Section 352 is plainly contrary to the deeply rooted principle of equality between the native-born and naturalized citizens as expressed in the opinions of this Court.

The classic formulation of this principle is found in the opinion of Chief Justice Marshall in *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-828 (1824):

> "A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not

proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might use. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none."

Nearly a century later this Court said in *Luria* v. *United States*, 231 U.S. 9, 21 (1913)

> "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save only that of eligibility to the presidency."

For similar but more recent statements, see also *United States* v. *MacIntosh*, 283 U.S. 605, 624 (1931); *Knauer* v. *United States*, 328 U.S. 654, 658 (1946).[5]

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[5] See also the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U.S. 44, 56, where he states:

> ". . . of course, naturalization unlawfully procured may be set aside. But apart from this circumstance the status of the naturalized citizens is secure."

And the concurring opinion of Mr. Justice Douglas in *United States* v. *Minker*, 350 U.S. 179, 197:

> "The citizenship of naturalized persons has the same dignity and status as the citizenship of those born here, save only for eligibility for the Presidency."

The Constitution neither makes nor permits Congress to make any other exception; and specifically provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside:"[6]

3. The Discrimination Is Without Legislative Precedent

There is no precedent in prior legislation for the discrimination between native-born and naturalized citizens.

This discrimination, which first became part of our law with the passage of the Nationality Act of 1940, is the *first* and *only* discrimination between native-born and naturalized that Congress has ever attempted. It is the single substantive exception to the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the Presidency of the United States to the native-born.) See *Luria* v. *United States*, *supra*, 231 U.S. 9, 21.

A prior distinction between native-born and naturalized citizens appears in the Act of March 2, 1907, 34 Stat. 1228, but it was a procedural not a substantive one.[7] The 1907 Act provided that if a naturalized

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[6] Amend. 14, Section 1 of the Fourteenth Amendment, as proposed, omitted the words "or naturalized". These words were added on motion of Senator Fessenden, and there is no record of any dissent in the Reconstruction Congress. Congressional Globe, 39th Cong., 1st Sess., Pt. 4, p. 3040 (June 8, 1866).

[7] Act of March 2, 1907, 34 Stat. 1228:

"Sec. 2.

. . . .

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any

citizen resided for two years in a foreign state from which he came or five years in another foreign state, a presumption would arise that he had voluntarily abandoned his citizenship. Under this statute such a presumption could be overcome "by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." It was, as this Court stated in *United States* v. *Gay*, 264 U.S. 353, 358 (1924), "a presumption easy to preclude, and easy to overcome. It is a matter of option and intent." This Act was nothing more than a requirement to state clearly an intention to continue allegiance to the United States. Furthermore, even in a case where the presumption should prevail, the effect, according to a ruling made by Attorney General Wickersham, 28 Op. Attny. Gen. 504 (1910), was only loss of diplomatic protection and not an actual loss of citizenship. Indeed, the Act had no application to a citizen who returned to the United States no matter how long he had stayed abroad. *Ibid.*

Thus the 1907 Act provided only a yardstick for voluntary and intentional expatriation. It imposed on the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not deprive loyal American citizens of their citizenship on grounds of mere residence abroad. *United States* v. *Gay, supra.* See also

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other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided*, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State many prescribe; *And provided also*, that no American citizen shall be allowed to expatriate himself when this country is at war."

Miller v. *Sinjen*, 289 F. 388 (8th Cir. 1923); *Camarado* v. *Tillinghast*, 29 F.2d 527 (1st Cir. 1928); *United States* v. *Eliasen*, 11 F.2d 785 (W.D. Wash. 1926).

In 1940, Congress in its new Nationality Act *for the first time* provided for involuntary or automatic loss of citizenship as a consequence of certain actions. 54 Stat. 1137. Section 404 of that Act provided flatly that naturalized citizens should automatically lose their citizenship after a sojourn of a certain period abroad; the present Section 352 is substantially similar to Section 404.[8]

Aside from the constitutional provision as to the presidency, Section 352 is the only provision in the 1952 Act as well as in the rest of our law which discriminates between native-born and naturalized citizens.

Thus, the discrimination in Section 352 cannot be justified on the basis of any long-established historical tradition. Justification, if any, must be based on the existing powers of Congress to deal with present-day problems.

4. The Discrimination Is Invidious in Its Nature

The discrimination embodied in Section 352 proceeds from the point of view that naturalized citizens *as a class* represent an inferior group of citizens, less loyal and less reliable than the native-born. In the words of the Report of the President's Commission on Immigration and Naturalization, *Whom We Shall Welcome*, 1953:

[8] Section 352 omits the provision of Section 404(a) terminating citizenship at an earlier date where an American residing abroad acquires foreign citizenship, which can now be found in Section 349(a)(1) of the present Act.

> "These provisions for loss of nationality, limited to naturalized citizens, create a *second-class citizen status.*" [Emphasis added][9]

For these reasons we submit that the discrimination in Section 352 is violative of the Fifth Amendment, even assuming *arguendo* that it could be rationally justified as tending to assist some legitimate congressional objectives. Classifications of citizens on the basis of birth or national origin "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and are suspect even when justified by the most extreme wartime emergency. *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

It is plaintiff's position that under no circumstances can Congress make, by a general law applicable in times of peace as well as emergency, invidious discriminations between citizens which result in the creation of "second-class citizenship" for some. Yet this is the unequivocal result of Section 352.

It is, of course, always possible for a law to distinguish between people on a basis that is not invidious. The tax laws treat married men differently from single men and persons over 65 differently from younger people, yet these distinctions are not invidious; nothing in the law suggests that a person in one of these categories is in any way inferior to persons in the other category. Section 352, however, presupposes inferiority on the part of naturalized citizens.

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[9] The Commission was established by President Truman at the urging of religious leaders. Its member were Thomas G. Finucane, Adrian S. Fisher, Rev. Thaddeus F. Gullixson, Msgr. John O'Grady, Clarence E. Pickett, Earl G. Harrison, and Philip B. Perlman, Chairman. The Executive Director was Harry N. Rosenfield.

Curiously enough, the exemptions which, to a very limited extent, have softened the broad sweep of Section 352, indicate perhaps better than anything else that these provisions presuppose an inferior status on the part of naturalized citizens.

For example, Section 354 (5) provides that Section 352 (a) (2) shall not apply to a naturalized American:

> "who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence. * * *"[10]

In introducing this exception Congressman Walter said (98 Congressional Record 4313, April 23, 1952):

> "Mr. Chairman, the purpose of this amendment is to preserve the citizenship of any naturalized citizen who has lived in the United States for 25 years and thereafter obtains employment or goes to some other country for business purposes. If he goes to the country of which he was a national, at the end of three years he would lose his citizenship. If he goes to a third country, at the end of five years he would lose his citizenship. *It is the opinion of the committee that after having resided in the United States for 25 years a citizen who has been a naturalized citizen for that period of time should be permitted to stay wherever his business requires him* for a period in excess of the 3- and 5-year periods." (Emphasis supplied).

Congressman Walter thus made clear that a naturalized American by twenty-five years' residence here could earn a permission "to stay wherever his business requires him," which a native-born citizen could obtain

[10] Prior to the amendment of Section 354(5), 73 Stat. 274, the period was twenty-five years.

without a single day's residence. A native-born citizen has apparently a conceded right without limitation "to stay wherever his business requires him" whereas a naturalized citizen must remain here for twenty-five years before he is granted, as a matter of grace, similar freedom. Clearly, by this discrimination the naturalized American has been consigned to the status of a second-class citizen.

The exceptions to Section 352 contain many other invidious discriminations. For example, Section 354 (1) makes an exception for any person who is a veteran of the Spanish-American War, World War I, World War II or the Korean War. Service in the armed forces of course entitles the naturalized citizen to some reward or recognition for his service to this country. But the privilege, the reward or recognition, is something which his fellow citizens who were born here obtain as a right without having earned it. Indeed it cannot be taken away from them even if they have been guilty of the greatest disservice to the nation in time of need. *Trop* v. *Dulles*, 356 U.S. 86 (1958). Here again the naturalized American who has met the statutory requirements for naturalization is placed in an inferior category from which he may escape and be given rights equal to that of the native-born only as a special reward.

Similarly, Section 353(2) provides that Section 352 shall not apply to a naturalized American who

> "is receiving compensation from the Government of the United States and has his residence abroad on account of disability in its service. . . ."

It should be noted that the individual need not be *employed* by the United States. He may, for example, be on a pension. Thus the naturalized American who

has incurred disability in the service of his adopted country is rewarded by being treated as a better, more reliable American than other naturalized citizens and the equal, by grace of Congress, of his native-born fellow citizen.

Section 354(2) contains an exception for persons doing work abroad which "in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce." This provision also asks the naturalized American to bear burdens of establishing special merit—this time to the satisfaction of a government official—before he can keep his citizenship while abroad, whereas the native-born American can do any work he pleases abroad (whether or not the Secretary of State thinks it will benefit the United States) without incurring this penalty. By attempting to regulate the kind of work that the naturalized American may carry on abroad by the standard of benefit to the United States, the law once more demonstrates the basic relegation of naturalized Americans to an inferior status. And by subjecting naturalized citizens to surveillance of the Secretary of State, who has no jurisdiction of activities of the native-born citizen abroad, the Act treats the naturalized citizen more like a parolee than like a full-fledged American. The whole process is inconsistent with a democracy, particularly America's melting pot democracy, the basic assumption of which is equality of all citizens before the law. See opinions of Mr. Justice Rutledge in *Schneiderman* v. *United States*, 320 U.S. 118, 167 (1943), and *Knauer* v. *United States*, 328 U.S. 654, 677 (1946).[11]

[11] Other discriminations equally invidious appear in other exemptions. For the convenience of the court at the end of this brief we have collected the full text of these exemptive sections.

5. The Discriminatory Provision Is An Assertion By Congress of the Right to Control Travel of Naturalized Citizens

Section 352, especially when viewed together with the exemptions Congress has made in Section 353 and 354, is an assertion on the part of Congress to regulate how long, under what conditions and for what purposes naturalized citizens may remain outside the United States. Congress has asserted the power to permit residence abroad on the part of naturalized citizens for some purposes, and to forbid such residence for other equally legitimate purposes. If Congress has this power at all, it may regulate, as it sees fit, the travel of naturalized Americans and their liberty to work, marry and live abroad. If Congress may keep a naturalized citizen from living more than three years abroad it may cut down this time to one year or even forbid naturalized Americans to reside abroad at any time.

Travel is of course a fundamental aspect of the personal liberty protected by the due process clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116, 125-128 (1958). In *Kent*, this Court stated (357 U.S. at 126):

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . ."

This Court then quoted at length from Professor Chafee's explanation of the extent of that liberty, citing in particular "reasons close to the core of per-

sonal life—*marriage* [illegible] families, spending hours with old friends." (*Ibid.*, emphasis supplied.) And of course we submit there is no basis for distinguishing between the right of the citizen to go abroad, and his right to remain there once he arrives, or to travel further as he pleases, provided of course his objective, e.g., business, family, life, health, pleasure, etc., is not one which Congress has the power to prohibit to naturalized and native-born citizens alike.

The power asserted in Section 352 is in reality the power to require naturalized citizens to remain within the territorial boundaries of the United States or restrict their activities outside those boundaries as to duration or nature. In addition to the fact that, as seen, this great power over the liberty and freedom of naturalized Americans does not apply in any degree to native-born citizens, it is a unconstitutional deprivation of the right to travel protected by the due process clause.

D. The Discrimination Cannot Be Justified As a Proper Exercise of the Foreign Affairs Power

As will be clear from the above discussion dealing with the character and effect of the discrimination in Section 352 between native-born and naturalized citizens, any attempted justification of this provision is impossible.

The Government has taken the position that the discrimination may be justified as a valid exercise of Congress' foreign affairs power.

As we shall demonstrate below, the discrimination is without justification under the foreign affairs power.[12]

[12] Under Point II we shall further establish that Section 352, even if applied to all citizens equally, would, under this Court's ruling in *Perez v. Brownell*, 356 U.S. 44 (1958), be beyond the power of Congress to enact.

The discrimination between native-born and naturalized citizens embodied in Section 352 affects, as we have seen, in a most serious way the personal rights and status of naturalized citizens. It involves the most basic of all rights—citizenship, and subjects naturalized citizens to travel and residence restrictions which are not and could not be imposed on the native-born. The discrimination, unprecedented in our law which up to now, has always considered the naturalized citizen equal to the native-born in all respects with the single exception of the constitutional provision limiting the presidency to the native-born, relegates the naturalized citizens to second-class citizen status solely because of their foreign birth.

To sustain this unprecedented classification affecting basic individual rights as meeting the requirements of due process requires at the very least a showing that this legislation was reasonably required to solve actual national problems. As stated in *Perez* v. *Brownell*, *supra*, 356 U.S. at 58,

> "... the means—in this case withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs."

The burden of justifying legislation affecting such fundamental personal rights as are here involved is substantially higher than where a classification affects interests constitutionally less important. *Bates* v. *City of Little Rock*, *supra*, 361 U.S. at 524; *West Virginia State Board of Education* v. *Barnette*, *supra*, 319 U.S. at 638-639.

Accordingly, to uphold the discrimination as a proper exercise of the foreign affairs powers would require a showing that the mere residence abroad of naturalized

citizens in and of itself raises serious problems affecting the conduct of our foreign affairs, while no similar problems are raised by the residence abroad of native-born citizens; and that withdrawing the citizenship of all naturalized citizens who reside abroad for the stated periods is an appropriate means to resolve such problems. *Perez* v. *Brownell*, *supra*.

The legislative history of the section, as are the papers the Government has submitted in these proceedings, fail to show the existence of any problems created by the mere residence abroad of naturalized citizens as distinguished from the native-born. As we shall see the indicated problems arise not from mere residence abroad but from special and limited circumstances or activities involving a very small number of naturalized citizens residing abroad and not only naturalized citizens. Since there is no suggestion that these special cases could not be appropriately met by more specific and limited legislation, rather than by placing these restrictions on naturalized citizens as a broad class the attempted discrimination is arbitrary, and plainly violative of due process. *Perez* v. *Brownell*, *supra*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, (1951).

The legislative history of the 1940 Act[13] indicates that the Cabinet Committee, which recommended passage of the Act, as well as the State Department, advised Congress in very general terms that problems raised by naturalized citizens residing abroad have been a source of difficulty and embarrassment to the United States. The nature of these problems was not

[13] Congress gave no special consideration to Section 352 when incorporating its provision in the 1952 Act. H. Rep. No. 1365, 82d Cong., 2d Sess.

specified. Reference is only made that they involve the necessity of giving diplomatic protection to persons living in foreign countries, and who owe no real allegiance to this country.[14] The Government, in its

[14] The Cabinet Committee which recommended passage of the Act made the following observation in support of the 1940 expatriation provisions relating to naturalized citizens:

> "Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality o ttheir foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside. . . ." (Hearings Before the Committee on Immigration and Nationality, H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., p. 409 (1940)).

In its comments on the proposed Section 402(b) the Cabinet Committee added (*id.* at 494-495):

> "The problem presented by naturalized citizens of the United States residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals of whom they are thousands at the present day, has been a source of difficulty and embarrassment to the government of the United States. . . ."

The testimony of the State Department's Mr. Flournoy on this point is also illuminating (*id.* at 36-37):

> ". . . under the laws now existing we have thousands of persons living in foreign countries, usually in the foreign countries where they were born, or where their parents were born, having all their interests there, and their family connections, and yet they are citizens of the United States, and may call on our government for protection.
>
> "I refer not only to the naturalized citizens who have gone back to their native lands or gone to other countries—and there are many thousands of them—but to their children, born in those countries, who are alien in all their characteristics and connections and interests, yet have the right to enter the United States as citizens. . . ."

papers, had added nothing to these generalities. See Memorandum for Respondent, pp. 9-10.

The reason, we think, that neither the legislative history nor the Government in its papers can offer support for this discrimination is because there is nothing in the mere residence abroad of naturalized citizens which in any way is potentially more embarrassing to the United States in the conduct of its foreign affairs than the residence abroad of a native-born citizen. It is plain that the mere residence abroad of an American citizen, no matter whether he be native or naturalized, does not in and of itself result in friction with foreign governments. Whatever problems a citizen residing abroad, be he naturalized or native-born, may cause to his government arise not from the mere fact of his residence abroad, but either as a result of special circumstances, or due to some course of conduct engaged in by the citizen.

For the challenged legislation to meet the requirements of due process a showing would be required that Congress could not reasonably deal with these problems, which do not attend mere residence abroad but do so only in a few cases when such residence is accompanied by other circumstances which create the problems, without restricting the residence abroad of all naturalized citizens.

Nothing in the legislative history or in the Government's Memorandum indicates that such a broad discriminatory restriction of the rights of naturalized citizens was reasonably required to deal with these problems. A consideration of suggested justification for this legislation will establish that such a drastic measure is plainly inappropriate to deal with any actual problem.

(a) It has been suggested (Memorandum for Respondent, p. 10), that the residence abroad of a citizen could result in difficulty with a foreign government if the foreign government does not recognize the person as an American citizen, or claims that he is a citizen of either that country or a third country. This, however, is not a problem which is limited to naturalized citizens, nor is there the slightest indication that it can not be dealt with by specific legislation directed to this particular problem.

Such a problem may arise from the residence abroad of dual nationals, whose allegiance is claimed by both the United States and a foreign state. But Section 352 does not purport to deal with the problem of dual nationality and is applicable whether or not the individual is a dual national. Most naturalized Americans are not dual nationals and some native-born citizens are. Dual nationality is expressly dealt with by another section of the Immigration and Nationality Act of 1952, Section 350, 8 U.S.C. § 1482, which spells out when certain dual nationals lose their citizenship by residence in the foreign state of which they are nationals. Petitioner is, of course, not a dual national or a citizen of Germany.[15]

A similar problem may arise in the rare instance that the foreign state refuses to recognize the natural-

[15] Under the German Nationality Act of July 22, 1913, as amended, Section 25 (Germany) reprinted in Laws Concerning Nationality, p. 183 (United Nations, 1954), appellant, on acquiring American citizenship in 1950, and undoubtedly before that time, no longer possessed German nationality. Under recently enacted laws she can if she so desires become a German citizen on application because she is married to a German citizen but there is no compulsion on her to exercise this option and she has deliberately not done so because she desires to remain a citizen of the United States.

ization of an American citizen who resides within its borders. Most states, however, recognize the holder of an American passport as an American citizen and make no claim on his allegiance, even though he might be a former national of that country. Indeed, the Government has made no reference to any state which does not recognize American naturalization. In this case, for example, petitioner, so long as she was an American citizen, was treated by Germany as an American and Germany made no claim upon her. (R. 11) Even now that petitioner is a stateless person, Germany regards her stateless and does not make any claim upon her allegiance. (R. 8, 11)

There is no indication why limited and unusual problems of the foreign state which refuses to recognize United States citizenship could not be resolved by legislation vastly narrower in scope than the broad restrictions embodied in Section 352. For example, if Congress had provided that naturalized citizens who travel to a country which does not recognize their naturalization have no right to diplomatic protection, or perhaps even lose their citizenship. This would have completely solved this potential problem without affecting the right of naturalized citizens to reside in the overwhelming number of countries which do recognize American naturalization.

(b) The conduct of an American citizen, while abroad, as differentiated from his mere residence abroad, may of course embroil the United States into difficulties with foreign countries. But conduct of this type may be engaged in by either native-born or naturalized citizens. And, of course, this possibility is no excuse for depriving of citizenship a naturalized citizen who does not engage in such conduct. Congress, in Section 349 of the Immigration and Nationality Act

of 1952, 8 U.S.C. § 1481 has attached to certain acts of this kind loss of citizenship irrespective of how the person involved acquired his citizenship. Under this section, any American citizen who voluntarily joins a foreign army, swears allegiance to a foreign government, or votes in a foreign political election, loses his American citizenship.

No form of conduct has been pointed out which when performed by naturalized citizens is likely to embroil the United States in difficulties with foreign governments, but has no such effect when performed by native-born citizens. It is difficult to imagine such a situation. However, if such a form of conduct should be found to exist, Congress could perhaps attach to such conduct loss of citizenship, only when performed by a naturalized citizen. However, the mere remote possibility that some conduct by naturalized citizens residing abroad might raise problems does not justify expatriating all naturalized citizens who reside abroad for the stated periods whether or not they engaged in the disapproved type of activity. Problems of this character (if any there are) could have been properly and specifically dealt with if such problems had been presented in detail to Congress, so that Congress could have formulated provisions to deal with actual problems.

(c) In the complete absence of any showing that the discriminatory treatment of naturalized citizens is necessary or appropriate to deal with any actual problems, the legislative history indicates that an attempt was made to justify the legislation upon the assumption that naturalized citizens who reside abroad have to all intents and purposes given up their American citizenship and broken their ties to this country. See footnote 14.

This assumption is unsubstantiated, entirely without any basis, and plainly cannot justify the discrimination.

Naturalized citizens who, years after their naturalization, take residence in the state of their former nationality, or in some other state, for family, health or business reasons unforeseeable at the time of their naturalization, generally do so without in the slightest way surrendering their identity as Americans.[16] Such residence abroad does not mean or imply reversion of the naturalized citizen to his former allegiance. Indeed, a naturalized American citizen who made the deliberate choice to become an American citizen may be expected to be as proud of his American citizenship and as insistent on retaining his identity as an American as a native-born citizen who holds his citizenship by the accident of birth. Naturalized Americans abroad by reason of their understanding of the customs and language of their native countries may, in fact, be the best representatives of this country and interpreters of the virtues of its institutions. Nor need one elaborate the point that in the present state of international affairs such interpreters should be encouraged and not repudiated.

Nor, particularly in these days of fast and low cost international travel, does residence abroad carry with it a rupture of the ties with this country. A person may reside in a foreign country yet make regular visits in the United States to keep intact contacts with family,

[16] As noted under Point I(B) the problem of naturalized citizens who acquired American citizenship without the required intention to make the United States their home is covered by Section 340(d) of the Act, 8 U.S.C. § 1451(d) which creates a rebuttable presumption that any naturalized citizen who takes up residence abroad within 5 years from the date of naturalization acquired his citizenship by fraud.

friends and country. But regular visits to this country (even if frequent) do not protect a naturalized citizen from loss of citizenship as a result of residence abroad for the stated periods. In Section 101(a)(33) of the Act the term "residence" is defined as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of Section 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

Thus, a naturalized citizen will lose his citizenship under Section 352 even though he comes to his country regularly from his place of abode elsewhere.

That a naturalized citizen by residing abroad cannot be assumed to have abandoned for all intents and purposes his American citizenship and broken his ties with his country will be evident from the facts of this case. Petitioner resides in Germany only because she is married to a husband who practices his profession there. (R. 10; 11) Petitioner left Germany when she was at the age of four. That she took up residence there many years later for a purpose plainly not contemplated when she left as a child, or when she was naturalized as a school girl does not mean that she has in effect abandoned her allegiance and interests in the United States, no more than in the case of a native-born who marries a nonresident. (R. 9) To the contrary, as she stated in her affidavit filed in support of her motion for summary judgment, petitioner feels herself as an American and wishes to retain her American citizen-

ship. (R. 7-9) Nor does petitioner's residence in Germany mean that she has disrupted her ties with her relatives, practically all of whom live in the United States (R. 8), and with friends she made during her long years of schooling and residence here. (R. 9) Petitioner's ties with the United States remain in being the same as those of any other American woman who happened to be married to a husband who practices his business or profession abroad. As is typical for most Americans who, for marriage or other reasons must reside abroad, petitioner visited this country for six weeks in 1957 to show her first-born son to her relatives and friends.[17]

Furthermore, in the hearings leading to the enactment of this discriminatory provision embodied in Section 352 mention was made that this legislation was necessary so that naturalized citizens could not pass on American citizenship to their children who could remain American citizens without ever residing in the United States. As Mr. Flournoy, the Assistant Legal Advisor to the State Department, put it, Hearings Before the Committee on Immigration and Nationality, H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., p. 137 (1940):

> "And then, I think another very important element of this thing is the children. It is utterly absurd that these Italians should live in Italy or Hungarians who live in Hungary who are breeding citizens of the United States, who have a right, whenever they see fit, to come over to this country."

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[17] Although it is not in the record, petitioner came here again in 1960 after the Department of State had determined she had lost her citizenship. She came here on a visit with papers that stamped her as a stateless person.

This plainly can not represent a justification of the discrimination between naturalized and native-born citizens.

A child of native-born Americans who was born abroad or was taken abroad at an early age would have no more ties to the United States than a child of naturalized citizens raised abroad.

If American citizens who have never lived in this country present a problem, then this might justify a requirement that all such persons, whether the children are of native-born or of naturalized Americans must, to retain their American citizenship, reside for some period of time in the United States. But it can not provide any justification for depriving naturalized citizens who reside abroad of their citizenship because they may have children there, while leaving native-born citizens free to have as many children outside of this country as they please. Furthermore, children of naturalized citizens born abroad often are dual nationals and as such are in any event under another provision of the statute, Section 350, 8 U.S.C. § 1482 subject to certain residence requirements.[18]

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[18] Section 350 provides in pertinent part:

"A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall—

(1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States diplomatic or consular officer in a manner prescribed by the Secretary of State; and

(2) have his residence outside of the United States solely for one of the reasons set forth in paragraphs (1), (2), (4)-(7), or (8) of section 353 of this title, or paragraph (1) or (2) of section 354 of this title."

In summary, there is simply no rational connection between the problem of the citizen who lives abroad and the statute's discrimination between native-born and naturalized citizens. The discriminatory treatment of naturalized citizens in Section 352 can find no justification in the foreign affairs power. Particularly in view of the heavy burden needed to justify any law involving the drastic penalty of loss of citizenship, it is clear that Congress exceeded its powers in passing Section 352 as applicable only to naturalized citizens. Of course, Congress has the authority under the foreign affairs power to enact regulatory measures designed to avoid international frictions. Its measures, however, must be appropriately limited to those difficulties. From the above discussions, it is clear that no special foreign affairs problems arise from the mere residence abroad of naturalized citizens. Other factors accompanying such residence abroad may in a few cases result in difficulties, but such factors do not attend the residence abroad of petitioner or of the vast number of other naturalized citizens who reside abroad.

Thus, in the present case, unlike *Perez* v. *Brownell*, 356 U.S. 44, (1958) "The classification Congress has adopted" is entirely "inappropriate to the difficulties to be dealt with." 356 U.S. at 59. A statute can not expatriate citizens on the basis of foreign residence where it is not the foreign residence itself which causes difficulties but some particular conduct or some situation applicable to particular persons or groups of persons. *Bailey* v. *Alabama*, 219 U.S. 219, *Tot* v. *United States*, 319 U.S. 463 (1943), *Heiner* v. *Donnan*, 285 U.S. 312 (1932). It can hardly be said that the problems caused by residence abroad when accompanied by such added factors cannot be met more discreetly.

Residence coupled with certain forms of activities might be made the basis for expatriation. Or perhaps the same could be done where by the law the place of such residence has certain friction-creating consequences, such as refusal by the foreign state to recognize United States nationality. Or perhaps even any residence at all at certain times and places might be made a basis for expatriation. But no considerations of these possibility appears on the legislative history. It is incumbent upon the legislature to act with an adequate regard for the vital individual interests at stake and the alternative means for achieving the purpose of its legislation. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). It plainly has not done so here. Equally plainly, there has been no valid exercise of the foreign affairs power.

Accordingly, the discrimination in Section 352 is arbitrary, without justification, and must be struck down as violative of the Fifth Amendment.

II. CONGRESS HAD NO POWER TO ENACT SECTION 352 EVEN WITHOUT ITS DISCRIMINATORY PROVISION

We have pointed out that the arbitrary discrimination against naturalized citizens in Section 352 is a violation of the Fifth Amendment's requirement of due process of law. But even if the Section applied to all citizens equally, we submit it would have been beyond the powers of Congress, to enact. Congress, under its foreign affairs power, does not have the authority to attach to the mere residence abroad the withdrawal of citizenship.

Congress has no general power to deprive any person of citizenship. "The power of naturalization, vested in Congress by the Constitution is a power to confer

citizenship, not a power to take it away . . . ." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703 (1889).

There is, of course, no question that citizenship may be voluntarily relinquished. The right of voluntary expatriation was recognized by Congress in 1868. Act of July 27, 1868, 15 Stat. 223.

It has also long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation, but that Congress may provide that certain actions, in derogation of undivided allegiance to the United States, constitute a voluntary abandonment of American citizenship. *Savorgnan* v. *United States*, 338 U.S. 491. Thus, for example, Congress can provide that taking an oath of allegiance to a foreign government constitutes a voluntary act of expatriation. Similarly, there is no question that Congress may make any other act which demonstrates an allegiance to a foreign state inconsistent with the retention of American citizenship an expatriating act.

A. The Power to Expatriate Is Limited to Political Acts Inconsistent With American Citizenship, and Connoting Allegiance to Foreign Country

This Court has never held that Congress may attach loss of citizenship to a neutral act that is a non-political act completely consistent with American citizenship. On the contrary, this Court in *Perez* v. *Brownell*, 356 U.S. 44 made it clear that Congress had no power to do so.

In *Perez* v. *Brownell*, *supra*, this Court held that Congress pursuant to its foreign affairs power could take away the citizenship of a person who voluntarily voted in a foreign political election.

Perez was careful to emphasize, however, that the controlling elements in the decision sustaining the Act were (1) the fact that voting in a foreign political election connoted a lack of allegiance to the United States and allegiance to a foreign country, and (2) the fact that it involved the participation by a United States citizen in the political affairs of a foreign nation.

Mere residence abroad, as developed in greater detail below, involves neither of these elements.

The *Perez* opinion is explicit in stating that voting in a foreign political election is an act inconsistent with American citizenship. It states, 356 U.S. at 60-61,

> "... Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure; at least, inconsistent with American citizenship."

Statements of similar import appear in other parts of the opinion. Thus, for example, at 356 U.S. 54, the Court quotes from the report of the Cabinet Committee which recommended the legislation

> "'Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and

> at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.'

At 356 U.S. 57, this Court also stated:

> "The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance."

Plainly, however, mere residence abroad is a completely neutral act and cannot, as was the act involved in *Perez*, be reasonably regarded as an act inconsistent with allegiance to the United States.

Hundreds of thousands of Americans now have their residences in other countries, some for business reasons, some for reasons of health, or for a great variety of other personal reasons. They include both naturalized and native-born citizens. These persons are in many cases engaging in the same kinds of activities which they might pursue in this country.[18]

It is impossible to see how residence abroad, taken alone, can demonstrate a want of allegiance to this nation, particularly in an era of vastly expanding foreign commerce, investment and travel. Congress itself has demonstrated that it does not regard mere residence as a sign of lack of allegiance, for it has not

[18] State Department figures show that there are at present over 670,000 Americans, excluding military personnel, who reside in foreign countries throughout much of the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 857,000 United States passports issued during the year 1961 some 105,000 were issued to naturalized citizens.

seen fit to expatriate native-born citizens even if they spend their entire lives in foreign countries. In the case of native-born citizens, Congress has based expatriation primarily upon voluntary acts committed in foreign countries, with the emphasis on their voluntary nature. See testimony of Mr. Flournoy in Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong., 1st Sess. on HR 6127, superseded by HR 9980, p. 133 (1940); Note, "*Voluntary, A Concept in Expatriation Law*," 54 Col. L. Rev. 932 (1954).

The facts of this case demonstrate that residence abroad has no relation to allegiance to the United States. The appellant's residence in Germany is solely the result of the fact that Germany is her husband's home and the place where he practices his profession. Plainly residence with her husband has no connotation of political allegiance to his country.[19]

Perez also makes clear that it was the political nature of the activity which justified the statute as a proper exercise of the foreign affairs power. The opinion emphasizes that Congress, under its foreign affairs power, may apply the sanction of withdrawal of citizenship to deal with difficulties of an acute nature which may arise, "when the citizen of one country chooses to participate in the political or governmental affairs of another country." 356 U.S. at 59. The opinion indicates that if the statute were applied to

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[19] Older ideas on this score, applied to naturalized and native-born women alike, have been repealed, in the United States by the Nineteenth Amendment and the Cable Act of 1922 and, in Germany by legislation which gives the wife of a German the option but not the duty to obtain the nationality of her husband.

participation in an election non-political in nature, it could not be sustained. It states, *id.* at 59-60:

> "The subtle influences and repercussions with which the Government must deal make it reasonable for the generalized, although clearly limited, category of 'political election' to be used in defining the area of regulation. That description carries with it the scope and meaning of its context and purposes; classes of elections—nonpolitical in the colloquial sense—as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any national construction of the phrase."

Mere residence abroad requires no political activity. Residence abroad does not involve participation in the political or governmental affairs of another country. This careful distinction between foreign political activity subject to sanctions and prohibition and neutral non-political activity required by *Perez* has not been observed in Section 352.

Where conduct inconsistent with allegiance to the United States and importing allegiance to a foreign country threatens, as a result of its political nature, to embroil the United States into difficulties with foreign countries, *Perez* says Congress may rationally resolve this problem by attaching to such conduct termination of citizenship.

But where conduct—such as mere residence abroad—is completely consistent with continued allegiance to the United States, and non-political in nature, there is simply no rational basis for termination of citizenship.

Our position that Congress has no general power to deprive citizens of their citizenship for a neutral act

such as mere residence abroad does not require this Court to hold that Congress may never place restrictions on living abroad. Under some circumstances a restriction on living abroad, limited to a particular time and place and justified by the unusual circumstances existing with respect to a particular country might well present a wholly different constitutional question. It is possible that during the existence of a state of war in Europe, when the 1940 predecessor of Section 352 was passed, Congress might have said to all citizens that residence in particular European countries at war with our allies would be taken as casting doubt upon the individual's allegiance. It might have required all American citizens residing in those countries to return to the United States, perhaps even on pain of loss of citizenship. But Congress in Section 352 has not made any attempt to limit the consequence of loss of citizenship to residence abroad at a time and place which might rationally demonstrate lack of allegiance or participation in the affairs of a foreign country. Congress' sweeping exercise of power therefore cannot be justified by the fact that more limited exercise might conceivably be constitutional. There is no rational basis for the exercise of power which Congress has attempted here.

B. Withdrawal of Citizenship on Basis of Mere Residence Abroad Is an Unconstitutional Regulation of Travel

The lack of Congressional power to impose a general restraint on mere residence abroad is emphasized by the importance this Court, in *Kent* v. *Dulles*, 357 U.S. 116 (1958) attached to the right to travel. As we have seen under Point I(C)(4) above the right to travel includes the right to remain abroad for reasons of marriage, family, health, or any other lawful purpose.

The right to travel which *Kent* says, "may be as close to the heart of the individual as the choice of what he eats, wears or reads"

> "is a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment." 357 U.S. at 125-126

A general limitation of this vital right without reference to specific problems which might exist at a given time or place is, we submit, violative of due process, and therefore beyond the scope of Congressional power.

III. SECTION 352 IS REPUGNANT TO THE EIGHTH AMENDMENT

Even if Congress was authorized to limit residence abroad under its foreign affairs power, we submit the means employed—loss of citizenship—is prohibited by the Eighth Amendment. This Court has held that expatriation, if employed by Congress as a penalty, constitutes cruel and unusual punishment within the meaning of the Eighth Amendment. *Trop* v. *Dulles*, 356 U.S. 86 (1958). If Section 352 is penal in nature, it violates the Eighth Amendment.

The criteria for determining whether or not a statute is penal in nature were set forth as follows in the opinion of Chief Justice Warren in *Trop* v. *Dulles*, *supra*, at pp. 96-97:

> ". . . In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other

legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

Under this standard we think it clear that Section 352 was intended to be a penalty and a deterrent rather than a mere regulation of foreign affairs.

The manifest purpose and effect of Section 352 is to deter and prevent naturalized Americans from living abroad for longer than stated periods. Regardless of their allegiance to this country, and regardless of whether they are or are not embarrassing this country's foreign relations, they may not, on pain or loss of citizenship, live abroad beyond the three and five year limits.

Conclusive proof of the penal nature of Section 352 is found in the exceptions to its operation in Sections 353 and 354. These latter sections exempt from the penalties of Section 352 persons who have, for example, lived in this country twenty-five years after their naturalization; served in the armed forces; or incurred a disability in the service of the United States. These

exceptions completely negate the assertion that Section 352 is a regulation of foreign affairs. For these exceptions are nothing more than a mitigation of punishment for certain kinds of good behavior—behavior utterly unrelated to foreign affairs. In these exceptions Congress is rewarding naturalized Americans for certain services or actions with respect to this country. Rewards are the counterpart of punishments. They go together, and the system of rewards and punishment set up by Sections 353 and 354 is unmistakably directed to individual conduct and not to foreign affairs.

In *Perez* v. *Brownell*, 356 U.S. 44, this Court held that expatriation was not used in a penal sense where it was made the consequence of a voluntary and intentional act—voting in a foreign election. The statute in question applied to naturalized citizens and native-born citizens alike. It attached the consequence of loss of citizenship to a variety of acts such as taking an oath of allegiance to another country or voting in a foreign election. All of these acts involved in greater or lesser degree deliberate, intentional renunciation of American citizenship. All of them involved to some degree adherence to the government of another country, and as a consequence all of these acts were potentially embarrassing to the foreign affairs of this country.

Mere residence abroad does not, however, imply voluntary renunciation of citizenship or allegiance to another power. Thus it cannot reasonably be said that the person who resides abroad has *voluntarily* divested himself of his American citizenship. This point is crucial. The *Perez* case appears to be based on the concept of voluntariness. The statute was deemed non-

penal because it set a consequence upon a voluntary act. In the present case, however, the statute imposes a penalty which the individual concerned did not invite or seek by any voluntary act. Here the purpose and effect of the statute is to deter naturalized Americans from leaving this country to live abroad and to punish them if they do so.

CONCLUSION

Petitioner is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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APPENDIX

Additional Relevant Statutes

The following is the text of Sections 353, 354, 356 and 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1101:

SECTION 352 NOT EFFECTIVE AS TO CERTAIN PERSONS

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

* * * * *

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided*, That such residence does not exceed five years; or

(7) is a spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1)—(5) or (6) of this section, or paragraph (2) of section 354 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period or periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former national-

ity and birth or residence in an area outside the continental United States: *Provided*, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804(b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

SECTION 352 (A) (2) NOT APPLICABLE AS TO CERTAIN PERSONS

SEC. 354. Section 352(a)(2) of this title shall have no application to a national—

(1) who is a veteran of the Spanish-American War, World War I, or World War II, or of the Korean hostilities (having served honorably in an active-duty status in the military, air, or naval forces of the United States during a period beginning June 25, 1950, and ending July 1, 1955), and the spouse, children, and dependent parents of such veteran, whether such residence in the territory of a foreign state or states commenced before or after the effective date of this chapter: *Provided*, That any such veteran who upon June 27, 1952, has had his residence continuously in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated for three years or more, and who has retained his United States nationality solely by reason of the provisions of section 406(h) of the Nationality Act of 1940, shall not be subject to the provisions or requirements of section 352(a)(1) of this title: *Provided further*, That the provisions of section 404(c) of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to veterans of World War II;

(2) who has established to the satisfaction of the Secretary of State, as evidenced by possession of a valid unexpired United States passport or other valid document issued by the Secretary of State, that his

residence is temporarily outside of the United States for the purpose of (A) carrying on a commercial enterprise which in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce; or (B) carrying on scientific research on behalf of an institution accredited by the Secretary of State and engaged in research which in the opinion of the Secretary of State is directly and substantially beneficial to the interests of the United States; or (C) engaging in such work or activities, under such unique or unusual circumstances, as may be determined by the Secretary of State to be directly and substantially beneficial to the interests of the United States;

(3) who is the widow or widower of a citizen of the United States and who has attained the age of sixty years, and who has had a residence outside of the United States and its outlying possession for a period of not less than ten years during all of which period a marriage relationship has existed with a spouse who has had a residence outside of the United States and its outlying possessions in an occupation or capacity of the type designated in paragraphs (1), (2), (3), (4), or (5) (A) of section 353, or paragraphs (1), (2), or (4) of this section;

(4) who has attained the age of sixty years, and has had a residence outside of the United States and its outlying possessions for not less than ten years, during all of which period he has been engaged in an occupation of the type designated in paragraphs (1), (2), or (4) of section 353, or paragraph (2) of this section, and who is in bona fide retirement from such occupation; or

(5) who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence; or who prior to attaining the age

of twenty-one years, shall have had his residence in the United States for not less than fifteen years subsequent to his lawful admission for permanent residence.

NATIONALITY LOST SOLELY FROM PERFORMANCE OF ACTS OR FULFILLMENT OF CONDITIONS

SEC. 356. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.

LOSS OF NATIONALITY BY NATIVE-BORN OR NATURALIZED CITIZENS

SEC. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this Act, apply for a visa and for admission to the United

States as a nonquota immigrant under the provisions of section 101(a)(27)(E); or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4)(A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be desig-

nated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

(b) Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act.